No. 15828

United States
Court of Appeals
for the Ninth Circuit

WM. A. SMITH CONTRACTING CO., INC., a corporation, and WM. A. SMITH CONTRACTING COMPANY OF CALIFORNIA, a corporation, doing business as a joint venture under the name of Lookout Point Constructors, Appellants,

vs.

MARLAND CURTIS, LYMAN CURTIS, GLEN C. CURTIS and RACHEL CURTIS, a copartnership, doing business as Curtis Gravel Company, Appellees.

BRIEF FOR APPELLEES

Upon Appeal from the United States District Court for the District of Oregon

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BRIEF FOR APPELLEES

Upon Appeal from the United States District Court for the District of Oregon

STATEMENT OF THE CASE

Appellant entered into a contract with the United States of America, acting by and through the Corps of Engineers of the United States Army, hereinafter referred to as the Corps of Engineers, on or about January 31, 1951, whereby appellant undertook to construct a portion of the re-located railroad track of the Southern

Pacific Railroad near Lookout Point Dam in Lane County, Oregon. (Def. Ex. 1).

By Contract dated June 10, 1951, a portion of this work was sub-contracted to Appellee, (Def. Ex. 2). The said sub-contract provided in part that Appellee was to produce in stockpile the ballast material referred to in Part B, Item 3b, of the prime contract. The completion date for this portion of the sub-let work was fixed by the sub-contract as October 15, 1951.

Prior to the completion date of October 15, 1951 for the work referred to above, and in compliance with the custom of the trade, and the understanding of these parties, Appellee requested advice as to the quantity of ballast material that should be stockpiled. Appellant promised a prompt determination but subsequently advised Appellee that such determination was not to be forthcoming. Appellee produced and put in stockpile approximately 4,000 cubic yards of ballast material in excess of the estimated quantity, and thereafter dismantled their crushing plant.

Sundry modifications and changes were made in the prime contract, and ultimately it was found that Appellant was required to purchase from other sources 12,837.07 cubic yards of ballast material for completion of their obligation to the Corps of Engineers. The Appellant claimed that the sum of $9,872.70 represented the excess cost of this quantity of ballast material over the

cost they would have paid Appellee for the same quantity under the terms of the sub-contract, and Appellant withheld this sum from payments owing to Appellee on account the ballast material produced and furnished by Appellee to Appellant.

In addition, Appellee furnished labor and equipment in excess of that contemplated by the prime contract. A claim for this "extra" was submitted by Appellee to Appellant for further submission to the Corps of Engineers. The total of claims so submitted by Appellee was in the sum of $17,085.28, of which sum $14,582.92 was approved by the Corps of Engineers and remittance in said amount was thereafter made to Appellant on or about April 1, 1953.

Demand was made by Appellee for the payment of the sums aforesaid, to-wit, $9,872.70 and $14,582.92, and failing to receive payment thereof this action was instituted.

STATEMENT OF POINTS TO BE URGED:

1. The sub-contract of June 10, 1951 (Def. Ex. 2) determines the obligations of these parties relating to the manufacture of ballast material.

2. Only a part of the prime contract (Def. Ex. 1) was sub-contracted to Appellee.

3. The prime contract was modified, extended, and altered subsequent to the date of execution of the sub-

contract, all without the participation or knowledge of Appellee.

4. The custom of the trade imposes an obligation on Appellant to advise Appellee of the quantity of ballast material to be stockpiled.

5. The parties understood the sub-contract agreement as requiring Appellant to advise Appellee of quantity of ballast material to be stockpiled.

6. Interest is allowable at the rate of 6% per annum from April 1, 1953 until paid on the sum of $13,707.-94, and from December 17, 1952, until paid upon the sum of $9,867.87.

SUMMARY OF ARGUMENT

The sub-contract did impose upon Appellee the obligation to furnish more or less than the estimated quantity of ballast material designated therein, but this obligation was dependent upon being advised prior to the completion date of this facet of the sub-contract the quantity which would be required. The Appellee is not bound to produce ballast material to be used in conjunction with construction not contemplated or provided for in the sub-contract of these parties or in the prime contract as the same existed at the time the sub-contract was executed.

The parties expressed their mutual understanding of Appellant's obligation to advise Appellee of the required

quantity of ballast to be stockpiled prior to the drafting of the sub-contract, and this understanding was affirmed by Appellant during the period of manufacture of ballast material.

The custom and usage of the trade imposes upon the Appellant the obligation of advising Appellee of the quantity of Ballast material required to be stockpiled.

Appellant after retention of the claimed extra cost of procuring ballast material from Appellee, proceeded to assert and process a claim for this amount to the Corps of Engineers for their own benefit.

The amounts in controversy represent sums certain which Appellant has wrongfully retained from Appellee's possesion.

ARGUMENT

I. Appellant was required to advise Appellee of quantity of ballast material to be stockpiled.

a. Sub-Contract is to be distinguished from the Prime Contract.

The Sub-Contract agreement of these parties (Def. Ex. 2) as the same relates to the matter of ballast material, differs materially from the prime contract entered into by Appellant and the Corps of Engineers (Def. Ex. 1). It is to be noted that the Sub-contract provides expressly that "The sub-let work is to include *a part* of Part B, Item 3b, Ballast Material" (Page 2,

Defs. Ex. 2). This language cannot be expanded to include the entire prime contract or even all of Part B, Item 3b. The distinction between the documents is well illustrated in comparison of the provisions of the Sub-contract requiring a stockpile of the ballast material by a specified date, and the total absence of such provisions in the prime contract.

The Appellant did not assign to Appellee a portion, or part, of their prime contract but, rather, a new and independent contract was executed by these parties, relating to certain work which the prime contract imposed upon Appellant. The terms, specifications, and drawings attending the prime contract were referred to in the sub-contract, but by no means can it be implied that Appellee was bound by all the terms and provisions thereof, particularly as said terms related to matters extraneous to Appellee's specific jobs.

The prime contract makes provision for a completed structure, whereas the sub-contract contemplates the letting to Appellee of certain designated steps required by Appellant in completing the structure. The sub-contract defines the obligations of Appellee, and resort to the prime contract is only incidental as a guide or aid in defining the type, quality or manner of service or material required. For illustration, the stockpiling of ballast material is neither required nor contemplated in the prime contract, and in conjunction with this facet of the sub-contract the terms and provisions of the prime contract are only germane as they designate the quality of ballast to be used.

The Appellant was obligated to place the ballast material (R. 57 and R. 148) and by virtue of Appellant's subsequent modifications and alterations of the terms of the prime contract, (Page 4 Pl. Ex. 1, Page 11 Pl. Ex. 1, Page 12 Pl. Ex. 1), and the unavailability of road bed, (R-86) this operation was not started by Appellants until long after the completion date specified in the sub-contract for the stockpiling of ballast material. It is now Appellant's contention that this sub-contract was a "requirement's contract" requiring Appellee to produce in stockpile by a date certain all the requirements of ballast material that Appellant might order over a period in the future to be determined only by the agreement of other parties, to-wit, Appellant and the Corps of Engineers.

To determine the rights of these parties resort must first be had to the sub-contract and then, and only then, to those portions of the prime contract which are referable to the sub-contract. We cannot say that merely because two contracts were in existence that Appellee is bound by all the terms, conditions and subsequent modifications of the contract to which they were not parties.

In the case of *Cruthers et al vs. Donahue*, 85 Conn. 629; 84 At 1. 322, it is said that "the specifications serve the purpose of explaining and amplifying the

provisions of the contract to which they refer. In fact, they show what the contract really was. They speak to the contract as it is; they cannot add to its terms unless the intent, as manifested in the contract, so to do, is clear." The Court made reference to *Moreing vs. Weber*, 3 Cal. App. 14, 20; 84 Pac. 220, wherein the Court said, "The rule seems so well established that it may be said to be elementary that where, in a contract, reference is made to another writing for a particular specified purpose, such other writing becomes a part of the contract for such specified purpose only, and, therefore, this writing, known as the 'specifications' can serve no other purpose than to furnish the plan and specifications as to how the grading should be done, and is foreign to the contract for all other purposes."

The cited case is annotated in Ann. Cas. 1913C, page 224.

It is stated in 9 Am. Jur. 11, that "Where, however, these plans and specifications are referred to in the contract for a particular specified purpose, such specifications can serve no other purpose than the one specified, and are foreign to the contract for all other purposes. In the absence of express provision in the contract, the specifications can neither restrict nor extend the scope of the contract to subjects other than those covered by the contract."

An application of the foregoing rules reveals that in the instant case the sub-contract as it pertained to

the stockpiling of ballast material cannot rely upon the terms and provisions of the prime contract other than as the specifications set forth the quality of material to be produced. The distinctions existing in conjunction with the stockpiling of ballast material as provided for in the sub-contract and the complete absence of such provisions in the prime contract wholly refute any contention that the prime contract is determinative of the agreement of these parties in conjunction with the manner of stockpiling, the time within which the same should be completed, or the respective obligations of the parties with reference to which shall determine the quantity to be stockpiled. It follows that resort must be had to the agreement and understanding of the parties with reference to the obligation to determine the quantity.

b. Understanding of the parties and usage and custom of the trade.

The transcript is replete with testimony regarding the understanding of the parties regarding Appellant's obligation to advise their requirements of ballast material prior to Appellee's completion date for this portion of the work. A meeting had in Pasco, Wn. on or about April 1, 1951, (R-56, 98, 110) concerns a discussion had between Marland Curtis, one of Appellees, and Mr. L. W. Huncke, of Appellants. Also present at this meeting was Mr. D. E. Thompson. At that time the parties made reference to the Appellant's obligation in this regard and the testimony and evidence relating to this conversation

clearly establishes the understanding of these parties with reference to Appellant's obligation. Subsequently, on September 21, 1951, Appellant reaffirmed this understanding of their obligation to advise us of the final quantity of ballast material by letter (Pl. Ex. 2B) wherein Appellee is advised that Appellant would furnish this determination of the requirements for their work "within the next two weeks."

As late as March 14, 1952, Appellant was still satisfied with the stockpiling efforts of Appellee as witnessed by Appellant's letter of March 14, 1952 (Pl. Ex. 2D) wherein it is stated that the quantity of ballast might be insufficient "should the Corps of Engineers reject any considerable quantity of the material". The record will show that none of the ballast material placed in stockpile by Appellee was, in fact, rejected by the Corps of Engineers.

The custom and usage of the trade in conjunction with the contractual obligations of the respective parties in circumstances similar to those posed in the instant case were well established by the expert witnesses called (R-77, 78, 81, 82, 50, 109). The sub-contract agreement in question, by virtue of Appellant's claim, is subject to ambiguity and uncertainty regarding which party shall be obligated to determine Appellant's requirements of ballast material. The face of the sub-contract agreement imposes the obligation to stockpile by a date certain the ballast material which Appellant shall re-

quire. It must be borne in mind that Appellant's requirements were not to be determined until some date after the expiration of the stockpiling of the ballast material; therefore, the written contract is silent as to which pary must bear the burden of making this determination of requirements. By virtue of the usage and custom of the trade, the testimony establishes that this obligation is upon the purchaser. It is stated in 55 Am. Jur. 287 (Usages and Customs Sec 27) that "such usage or custom is to be given effect as one of the terms of the contract and is binding on the parties as though it were written. The broad general rule is that proof of a valid usage or custom is admissible to annex incidents to a written instrument, and to aid in its construction, and to ascertain the intention of the parties in reference to matters about which the contract is silent, provided such usage or custom is not contradictory of or inconsistent with the plain terms of a written agreement and its effect is not to add or to engraft any new agreement or stipulation thereon." In the instant case it is apparent that nothing new or inconsistent is being determined by application of both the understanding of these parties and the custom and usage of the trade as the same is applied to the language of the sub-contract agreement.

While it is conceeded that the understanding of one of the parties to an agreement does not determine the intent of the parties, in the instant case the evidence establishes that it was the understanding of both parties that Appellant was obligated to advise Appellee of the quantity of ballast material required prior to the date

upon which this ballast material was to be placed in stockpile. It is stated in 12 Am. Jur. 753 (Contracts § 231), "While under some circumstances the understanding of a party to an agreement is of some importance in interpreting it, what one party to an agreement understands or believes does not ordinarily govern its construction, unless such understanding or belief was induced by the conduct or declaration of the other party or was known to the other party. The language of a promisor is to be interpreted in the sense in which he knew or in which he had reason to suppose it was understood by the promissee."

As a practical matter, it is apparent that in viewing the relationship of these parties at the time the sub-contract was executed, it was essential that Appellee have some knowledge of how long he would be required to maintain his crushing equipment at the site for the purposes of manufacturing the ballast material to be put in stockpile. His bid was not based upon the whim or caprice of Appellant. It is to be noted that the cost of maintaining the crushing equipment at the site approximates $15,785.00 per month (Pl. Ex. 2H). From this fact it is apparent that Appellee was contracting on the basis of a firm completion date for this facet of the contract. The fact that the parties entered into a new and separate agreement, wholly independent of the prime contract, to-wit: an agreement requiring a *stockpiling* of ballast material, imports that both parties were cognizant of the requirement for a completion date so that the rock crushing equipment

could thereafter be removed. The only reasonable interpretation of this portion of the sub-contract agreement imposes upon Appellant the obligation to advise Appellee of the requirements. It is inconceivable that Appellee could be charged with the duty of determining the "requirements" of the other party.

c. Appellant's Appeal to the Claims and Appeals Board.

It is undisputed in the record that Appellant's submitted a claim, on their own behalf, to the Claims and Appeals Board, seeking to recover from the Corps of Engineers their claimed extra cost of procuring ballast. This is the precise matter now in issue. Appellant has retained from Appellee this "extra cost of procuring ballast", and thereafter, and upon their own initiative, endeavored to recover again from the Corps of Engineers. If Appellant's position in this case were tenable, then obviously Appellant had sustained no damage and would not be entitled to any recovery from the Corps of Engineers. It is further to be noted that Appellant was allowed a recovery of $1,845.00 in conjunction with this very claim (R-178). Appellant did not tender said recovery to Appellee nor did Appellant even advise Appellee of receipt thereof. It was establshed in the record (Pl. Ex. 1) that during the course of construction, and long after the execution date of Appellee's sub-contract, that certain additional ballast material would be required. It is further established that this fact was not made known to Appellee prior to the dismantling of

Appellee's crushing plant.

In conjunction with claims to the Corps of Engineers, Appellee has remained at all times consistent. The record establishes and Appellants admit on page 4 of their brief that Appellee submitted to Appellant for further submission to the Corps of Engineers claims representing "extras" totaling over $17,000.00. The Corps of Engineers approved from these claims a lesser sum of $14,582.92. It is not Appellee's contention that Appellant is liable for the additional sums not allowed by the Corps of Engineers. The Appellees did not submit for processing to the Corps of Engineers their claim in conjunction with the "extra cost of procuring ballast" claimed by Appellant. This item was a charge deducted by Appellant from sums owing to Appellee, and Appellee's demand was always directed solely to Appellant.

d. Analysis of Appellant's claim for "extra cost of procuring ballast".

An analysis of the amount claimed by Appellant on account extra cost of procuring ballast will reveal that pursuant with the agreed statement of facts (R-6) that an item of $2,366.26 is set forth as being the cost of "extra train hauls from Jasper to". The testimony of Mr. Douglas Salm, Appellant's superintendent at the job site, (R-127) reveals that the Jasper Switch is on the new construction. The sub-contract provides that the ballast material shall be delivered to the Appellant "on

the relocated portion of the Southern Pacific line" (Page 2, Def. Ex. 2). The undisputed facts and testimony establish that the item of $2,366.26 included in the claim of $9,872.70 was improperly assessed under any theory. The claimed extra cost to Appellants of the additional ballast required should, therefore, be reduced by this sum of $2,366.26.

II. Comments on Appellant's authorities.

The authorities cited in Appellant's brief fall within categories which may roughly be designated as follows:

a. Cases pertaining to "requirements contracts;"

b. Necessity of performance regardless of difficulty or loss;

c. The parole evidence rule;

d. Consideration must accompany modifycation of contract;

e. Interest.

a. The cases cited with reference to "requirements contracts" merely enunciate the elementary rule of law sustaining the validity of such contracts as said rule of law is commented upon in the annotation in 14 A.L.R. 1300. In the instant case there is no dispute that the "estimated quantity" of ballast material as the same is set forth in the prime contract did not limit or control

the quantity of ballast that Appellee might have been called upon to produce and stockpile. It is agreed that the matter of Appellant's requirements could well be more or less than this quantity but the real dispute rests in the matter of Appellant's obligation to advise Appellee of this quantity. In none of the cases dealing with "requirements contracts" cited by Appellant do we find a case dealing with the delivery of requirements wherein the purchaser was not obligated to place his order and advise the seller the extent of these requirements. In every instance the converse is true and the purchaser has always made his requirements known, and the litigation thereafter ensued because the seller failed or refused to deliver these requirements. See

> *Brooks vs. Bechill*, 63 Ore. 200, 124 Pac. 201;
> *Cragin Products Co. vs. Fitch et al*, 6 F. (2d) 557;
> *Tampa Shipbuilding & Engineering Co. vs. General Const. Co.* 43 F (2d) 309.

b. The cases cited with reference to a claim of excuse for nonperformance by reason of loss or delay have no bearing in the instant case. It was not Appellee's contention that there was any non-performance of their contractual obligations. Appellee did fully perform its contract agreement to the best of its ability, and the requirement for additional ballast with which Appellant was faced was resultant from Appellant's own act. It is conceeded that the mere fact that performance will result in loss is no excuse, however, in the instant case

Appellee was ready and willing to perform and to put into stockpile such requirements of ballast material as Appellant should designate. This willingess is evidenced by the exchange of correspondence requesting this information.

c. Appellee likewise concedes the general rules relating to parole evidence as being inadmissible to modify a contract which is complete upon its face. The cases cited by Appellant to enunciate this rule do, however, emphasize the fact that parole evidence is admissible to explain an incomplete or ambiguous contract. See

American Contract Company v. Bullen Bridge Company, 29 Ore. 549, 46 Pac. 38.

In every case cited with reference to the parole evidence rule it is noted that the first consideration is a contract complete on its face and one in which the parties are endeavoring by parole to add to, subtract from, or otherwise alter or change the clear language of the contract. In the instant case the parole evidence admitted came clearly within the purview of ORS 42.220. The parole evidence to which Appellant objects merely confirms the intent and understanding of these parties as to the meaning of the contract, and the intent and meaning of the contract in the light of the customs and usuage of the trade. In *Taylor v. Wells*, 188 Ore. 648, at page 654, the Court states:

> "We are reminded that 'for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.' "

d. Appellant's contentions with reference to a modification of the contract of these parties are wholly extraneous to the matter at issue. The citations urging the proposition that a modification of an existing contract must be accompanied by a consideration is beyond dispute. This rule of law, however, has no application in the instant case as the matter of modification of the contract existing between these parties was not in issue. If modification existed this modification was resultant from the efforts of Appellant to modify and enlarge their contract with the Corps of Engineers after the execution of the sub-contract, and then to impose these increased obligations upon Appellee.

Commenting further upon Appellant's citations, it is noted that in *Savage vs. Salem Mills Co.*, 48 Ore 1, 85 Pac. 69, the Court states:

> "and, in the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of the contract made by a person engaged in such business and those dealing with him with knowledge of such custom and usage, although proof of a custom and usuage is never admissible to give interpretation to a contract inconsistent with its language."

e. Exception is taken to the language appearing in Appellant's brief, page 53, to the effect that "there are only two types of interest, namely, contractual interest or interest as damages which are recognized by law. City of *Seaside vs. Oregon S. and C. Co.*, 87 Ore. 624; 634." The language appearing in that case to which Appellant apparently refers states:

> "There are two ways only in which interest may be collectible: (1) by contract to pay interest; and (2) by statutory authority."

The distinction in this language is apparent when construed in conjunction with O.R.S. 82.010.

The syllabus in *McCarty vs. Gault*, 24 F. Supp. 977, states:

> "Interest should be allowed where principles of equity and justice in enforcement of an obligation demand, even though there is no legislative mandate."

In the instant case there can be no doubt that the sum of $9,872.70 was the ascertained amount which Appellant had retained from the account of Appellee, and the date upon which this account matured was not disputed.

It has further been established that Appellant

received and retained the full sum of $14,582.92 from the Corps of Engineers, and that this money was the property of Appellee, less only Appellant's handling charges and costs in conjunction with processing the claim. The record illustrates that these figures for processing and handling were solely within the knowledge of Appellant, and that Appellant could easily have ascertained the amount of these claims and should have immediately tendered the balance to Appellee. The record discloses that Appellant did not notify Appellee of receipt of the said sum (R-179), and, likwise, Appellant *wholly* failed to advise or make demand upon Appellee for the amount claimed by Appellant on account of expenses of processing the claim.

The established facts regarding Appellant's receipt and retention of the funds in question and the resultant loss of the use of these funds by Appellee fall within the purview of O.R.S. 82.101 and the allowance of interest cannot be denied upon the mere fact that Appellant refrained from asserting or making known to Appellee any charges or expenses to which Appellant was entitled by reason of processing the claim to the Corps of Engineers.

The contention that since Appellee's Complaint made demand in the sum of $11,742.77, which sum combined the sum of $9,872.70 (amount retained by Appellant on account claimed extra cost of procuring ballast) and the additional sum representing Appellee's claim on account movement of railroad cars does not render the

amount on account the extra cost of procuring ballast as an unliquidated sum. The amounts referred to above were at all times definite and certain and it was so stated in the agreed statement of facts (R-6).

Appellant has enjoyed the use and possession of these sums of money, and the attendant obligation to remit the same to Appellee, together with interest thereon, is manifest.

SUMMARY AND CONCLUSION

The matters in dispute in the instant case concern themselves only with the question of the Appellant's obligation during the term of that portion of the sub-contract dealing with the stockpiling of ballast material to make known their requirements of such material. The Appellee's obligation was clear to the effect that Appellee was obligated to manufacture and stockpile such quantity of ballast material by a date certain as Appellant would require. If it be found that Appellant was obligated under the terms of this sub-contract agreement to make his requirements known during the term of this contract, then obviously it must follow that Appellant's failure to so do must result in an affirmance of the existing judgment. The facts and the law pertaining to this matter leave no doubt as to the security of Appellee's position.

The matters in issue are not those contended for in Appellant's brief. Appellee does not now, nor at any time during the association of these parties has Appellee contended that there was a basis for excuse for performance, excepting as Appellee was denied the right to produce in stockpile all of Appellant's requirements by reason of Appellant's failure to make those requirements known.

The parties entered into a contract, which contract made reference to and incorporated certain features of

Appellant's prime contract with the Corps of Engineers. Appellant now is endeavoring to impose upon Appellee *all* of the terms and provisions of the prime contract, even as the same was subsequently altered and amended without the consent or knowledge of Appelee.

Appellants have retained sums of money, which sums are definite and certain, and have always been readily ascertainable, and Appellee is entitled to the payment of these sums, together with interest thereon at the statutory rate of six (6%) per cent per annum from the date of maturity of these accounts.

For the reasons stated herein, the judgment of the District Court entered herein should be affirmed.

Respectfully submitted,

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